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Supreme Court, U.S.
FILED

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**IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 2000**

DR. FRANCIS J. WHELAN,
Petitioner,

v.

ELIZABETH A. PALMER,
Respondent.

On Petition for Writ of Certiorari
to the West Virginia Supreme
Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

October 4, 2000

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QUESTION PRESENTED

Whether the West Virginia Circuit Court erred in refusing to grant a motion pursuant to Rule 60(b)(4) to vacate enforcement of a judgment from another state (in this case, Texas), pursuant to West Virginia Code section 55-14-1. et seq., when the trial court did not consider whether the state entering the judgment (Texas) had subject matter jurisdiction and the Texas judgment was void because the statute of limitations had run.

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Dr. Francis J. Whelan respectfully petitions this Court for a writ of certiorari to review the judgment of the West Virginia Supreme Court of Appeals in this case.

OPINIONS BELOW

The order of the West Virginia Supreme Court of Appeals is unreported and is reprinted in the appendix hereto (Pet.App.) at 1a. The opinion of the Circuit Court of Raleigh County, West Virginia, is unreported and is reprinted at 2a.

JURISDICTION

The order of the West Virginia Supreme Court of Appeals was entered on July 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

STATUTORY PROVISIONS

The statutes involved are West Virginia Code section 55-14-1, et seq., V.T.C.A., Civil Practice & Remedies Code sections 16.066, 35.001-35.008, and Hawaii Revised Statutes section 657-5 (1985).

STATEMENT

1. This case presents the question of the recognition of a void Texas judgment by the West Virginia courts. The plaintiff in the Texas action, Elizabeth A. Palmer (formerly, Whelan), sought to have the Texas judgment enforced in West Virginia, pursuant to W.Va. Code section 55-14-1, et seq. The Texas judgment was

entered on December 8, 1994, in the district court in Bexar County, Texas. Pet. App. at 3a.

2. The Texas case involved a dispute about the property settlement agreement and the decree of divorce of Francis J. and Elizabeth A. Whelan. The decree of divorce was entered in August 1979, in the State of Hawaii. The property settlement agreement provided that Dr. Whelan was to purchase a residence for Elizabeth Whelan in Bexar County, Texas. Id. at 3a-4a.

3. In 1994, Ms. Palmer filed a petition in Bexar County, Texas, to quiet title to facilitate sale of the residence. Id. at 3a-4a. After the case was heard on December 5, 1994, the Texas court issued a final judgment which provided that Dr. Whelan was liable for damages in the amount of $72,757.43, plus attorneys' fees. The damages were based on an amended petition that alleged that Dr. Whelan had breached the divorce decree and property settlement agreement by failing to make monthly mortgage payments on the residence. Id.

4. Ms. Palmer then sought to enforce the Bexar County, Texas, judgment in the Circuit Court of Raleigh County, West Virginia, pursuant to West Virginia Code section 55-14-2. A Rule 60(b) motion based on mistake, inadvertence or excusable neglect was denied by

the trial judge in Raleigh County on January 18, 1996. Id. at 2a, 4a-6a.

5. On October 7, 1999, Dr. Whelan sought to have the January 18, 1996, order dismissed for lack of subject matter jurisdiction. Id. at 6a. The trial court denied the motion on January 26, 2000. The trial court found that Dr. Whelan had consented to personal jurisdiction of the Texas Court. However, the issue presented in the October 7, 1999, motion involved subject matter jurisdiction, not personal jurisdiction. The trial court did not address whether there was subject matter jurisdiction. Id. at 7a-9a. The trial court also declined to review the issue as to whether the Texas action was barred by the statute of limitations, finding that the issue had previously been determined by the January 18, 1996 Order, which stated that there were no meritorious defenses to the action in Texas. Id. at 7a-9a.

6. The petition to appeal the January 26, 2000, judgment was denied by the West Virginia Supreme Court of Appeals on July 6, 2000. Id. at 1a.

REASONS FOR GRANTING THE WRIT

The decision below creates a split of authority, by permitting a state circuit court to enforce the judgment of another state without

considering whether the original state court had subject matter jurisdiction and whether that judgment was void. If the decision below is permitted to stand, it would permit enforcement of an order without the court having performed the required task of determining whether subject matter jurisdiction existed.

The decision below violates the fundamental jurisprudential principle that relief from void judgments is not discretionary. Further, the time within which a Rule 60(b)(4) motion may be brought is not constrained by reasonableness. 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure section 2862, at 322 (3d ed. 1995); Chambers v. Armontrout, 16 F.3d 257, 260 (8th Cir. 1994); Hertz Corp. v. Alamo Rent-A-Car, Inc., 16 F.3d 1126, 1130 (11th Cir. 1994).

A void judgment is a nullity and may be attacked at any time and in any court. State ex rel. Lemley v. Roberts, 260 S.E.2d 850, 852 (W.Va. 1979). If the underlying judgment is void, it is a per se abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4). U.S. v. Indoor Cultivation Equipment, 55 F.3d 1311, 1317 (7th Cir. 1995)(because the district

court had no authority to enter the default judgment, it is void and should have been vacated; the 60-day period for commencement of forfeiture had expired).

The Circuit Court in Raleigh County, West Virginia, was presented with a Texas judgment and asked to enforce it pursuant to the Uniform Enforcement of Foreign Judgments Act, West Virginia Code section 55-14-1, et seq. In enforcing the Texas judgment, the West Virginia court did not consider whether the Texas court had jurisdiction to enter the judgment. In a determination whether the Texas court had jurisdiction, the West Virginia court was governed by Texas laws. Lemley v. Barr, 343 S.E.2d 101, 105 (W.Va. 1986).

The Texas judgment, in turn, was based on the enforcement of a divorce decree from the state of Hawaii. The Texas statute of limitations for enforcing a foreign judgment applied. V.T.C.A., Civil Practice & Remedies Code section 16.066; Lawrence Systems v. Superior Feeders Inc., 880 S.W.2d 203, 208 (Tex.App.-Amarillo 1994). That statute provides that an action on a foreign judgment is barred if the action is barred under the laws

of the jurisdiction where the judgment was rendered. The Hawaiian laws concerning the statute of limitations apply in determining whether the Hawaiian divorce decree could be enforced in Texas.

The applicable Hawaiian statute of limitations is ten years. Hawaii Revised Statutes section 657-5 (1985); Broooks v. Minn, 836 P.2d 1081, 1086 (1985). The statute of limitations runs from the date the judgment was entered and not from the date of any alleged breach of the contract. Brooks, 836 P.2d at 1086 n. 10.

Because the Hawaiian divorce decree was entered in 1979, any action to enforce that decree must have been brought by 1989. The action brought in Bexar County, Texas, in 1994 to enforce the Hawaiian divorce decree was clearly time-barred. The Texas judgment is void to the extent that it is based on the purported enforcement of the Hawaiian divorce decree. The damages awarded in the 1994 Texas action were based on a provision in the Hawaiian divorce decree concerning mortgage payments to be paid by Dr. Whelan. Thus, the judgment of the Texas court that Dr. Whelan breached

the Hawaiian divorce decree is a nullity. The Texas court did not have jurisdiction to enforce the Hawaiian divorce decree.

Because the Texas court lacked jurisdiction to enforce the Hawaiian divorce decree, the West Virginia court could not enforce the Texas judgment to the extent it was an enforcement of the Hawaiian divorce decree. Consequently, the January 18, 1996, order of the Circuit Court of Raleigh County, West Virginia, is void. The West Virginia judgment is null and unenforceable. West Virginia Code section 55-14-1, et seq.

In the January 26, 2000, order of the Circuit Court of Raleigh County, West Virginia, the trial judge addressed the question of whether the Texas court had personal jurisdiction over Dr. Whelan. Pet. App. at 7a-9a. However, the question of personal jurisdiction is a distinct and separate issue from the question of subject matter jurisdiction. If a court lacks personal jurisdiction, a subsequent action may be brought in an appropriate forum. Posner v. Essex Ins. Co. Ltd., 178 F.3d 1209, 1221 (11th Cir. 1999) By contrast, because the statute of limitations had run, the Texas court lacked

subject matter jurisdiction to enforce the Hawaiian divorce decree. U.S. v. Indoor Cultivation Equipment, 55 F.3d 1311, 1317 (7th Cir. 1995)(once the 60-day period had expired, the court had no authority to enter judgment' district court should have vacated the judgment under Rule 60(b)(4)).

This case presents the important issue of whether one state can enforce a judgment from another state without determining whether the originating state had jurisdiction to enter that judgment. Absent a clear statement from this Court on this question, void judgments from one state can be enforced in another state.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

October 4, 2000

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of July, 2000, the following order was made and entered:

Elizabeth A. Palmer, Plaintiff
Below, Respondent

vs.) No. 000829

Dr. Francis J. Whelan, Defendant
Below, Petitioner

On a former day, to-wit, April 25, 2000, came the petitioner, Dr. Francis J. Whelan, pro se, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Raleigh County, rendered on the 26th day of January, 2000, with the record accompanying the petition.

Upon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition for appeal. Justice McGraw would grant.

A True Copy

Attest: Deborah Z. McHenry
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

ELIZABETH A. PALMER,
Plaintiff,

v. CIVIL ACTION NO. 95-C-452

DR. FRANCIS J. WHELAN,
Defendant.

ORDER DENYING DEFENDANT'S MOTI TO DISMISS ORDER ENTERED JANUAR 18, 1996

Pending before the court is the Defendant' Motion to Dismiss Order entered January 18, 19 The court has reviewed Defendant's motion, the court file and pertinent legal authorities. As a res of these deliberations, for the reasons set forth in the following opinion, the Defendant's Motion to Dismiss Order entered January 18, 1996 should be denied.

PROCEDURAL HISTORY

In August of 1979 the parties were divorce in Honolulu, Hawaii; as part of the property settle ment agreement the Defendant was required to pu chase a residence in the State of Texas for the

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benefit of the Plaintiff. It appears that the Defendant did purchase the house, but that Defendant's name appeared on the title. Additionally, in January of 1995, in violation of the property settlement agreement Defendant ceased to make payments on the house. The Plaintiff started making the house payments. Later when Plaintiff attempted to sell said house, the Defendant refused to sign the papers releasing the property.

Plaintiff then brought suit in Bexar County, Texas to quiet title to the house, to recover actual damages, including mortgage payments going back to 1985, and attorney fees. Defendant was properly served in this matter, and filed an answer in accordance with Texas law. On the 5th day of December 1994, the matter was set for hearing. The Defendant, after receiving proper notice of the hearing, failed to appear. The record shows that the Defendant had filed a motion for a continuance; however, the Honorable John J. Specia, Jr. ruled that the motion for continuance was defective on its face because it was not verified. The Texas court entered a judgment in favor of the Plaintiff.

The Plaintiff then registered said foreign judgment in Raleigh County, West Virginia, the Defendant's place of residence. The

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Defendant filed a Motion for Relief from Judgment. In December, 1995, the court heard the Defendant's motion for relief from judgment entered in the 131st Judicial District, Bexar County, Texas, in a case entitled Francis J. Whelan vs. Elizabeth A. Whelan, 94-CI-12093. Following said hearing, Defendant's motion was denied based upon the foregoing procedural history and more specifically, for the following reasons:

(6) The court finds the grounds stated by Dr. Whelan for refusing to comply with his obligations as contained in the property settlement agreement made part of the Final Divorce Decree from the State of Hawaii to be frivolous and vexatious.

(7) Rule 60 provides that in determining whether default judgment should be vacated under Rule 60(b), the trial court should consider (1) the degree of prejudice suffered by the plaintiff in the delay in answering the Complaint (2) the presence of material issues of fact and meritorious defenses (3) the significance of the interests at stake and (4) the intransigence on the part of the defaulting party. While this is not a default action, and there was a hearing held in Bexar County, Texas, the analysis under Rule

60(b) would be appropriate in this case.

... It is the opinion of this court that Dr. Whelan has failed to establish, by any method, that he made mistakes that were inadvertent or excusable based on his position, knowledge and information. It is clear from the proffered evidence that Dr. Whelan knew of the date of the trial in Texas. ... It is likewise clear, based on the proffered evidence at the hearing on the Rule 60(b) Motion, that Dr. Whelan is more informed regarding the legal process than is the average citizen and knows the need and necessity of filing motions for continuance and other documents, and has some knowledge, based on the proffered evidence, of the general workings of courts. ...

Order entered January 18, 1996; Judge John A. Hutchison, Raleigh County, West Virginia. The Defendant then filed an appeal of this court's ruling to the West Virginia Supreme Court of Appeals. On the 19th day of February, 1997 the Defendant's appeal was refused by the Court.

On October 7, 1999, the Defendant has filed a Motion to Dismiss Order Entered January 18, 1996, this is the matter currently

before the court.

DEFENDANT'S ARGUMENT

The Defendant is arguing that this court erred as a matter of law by enforcing the Texas judgment because Texas lacked jurisdiction to hear the case, resulting in the foreign judgment, that is the subject matter of this case. Defendant further argues that the Plaintiff's Texas action was barred by the statute of limitations.

CONCLUSIONS OF LAW

First and foremost, this court is of the opinion that the motion at bar is yet another attempt to appeal this court's January 18, 1996 Order. Not only has the Defendant filed a formal appeal, which was denied by the West Virginia Supreme Court of Appeals, but the appeal period for said Order has long since past. However, because an allegation of lack of jurisdiction is a serious defect, it must be addressed by this court. Nevertheless, the Defendant's motion to dismiss must fail on its merits.

The Defendant is arguing lack of jurisdiction in the Texas suit; however, the Defendant admits, and the record shows, that the Defendant filed an Answer and a defective motion for continuance in the Texas suit. In order to determine whether

the Texas court had jurisdiction over the case, it is necessary to examine Texas law. According to Texas law,

> [A] special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. ... Such special appearance shall be made by sworn motion filed prior to motion to transfer venue and any other plea, pleading or motions; provided however, that a motion to transfer venue and other plea, pleading or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. ... Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

TEX.R.CIV.P. 120(A).

In elaboration on Texas Rule of Civil Procedure, Rule 120(a), Texas case law is quite clear that any appearance not in accordance with Rule 120(a) will be a

general appearance, subjecting the defendant to personal jurisdiction.

A party must strictly comply with Rule 120(a) to avoid making a general appearance. See Dawson-Austin v. Austin, 920 S.W.2d 776, 783 (Tex.App. -Dallas 1996, no writ); Morris v. Morris, 894 S.W.2d 859, 862 (Tex.App.-Fort Worth 1995; no writ). Regardless of the defendant's contacts or lack thereof with the forum state, if defendant appears before a court or files a responsive pleading without asserting a jurisdictional defense, personal jurisdiction in that court is established by the defendant's consent, and the defendant's objections to personal jurisdiction are waived. See Dart v. Balaam, 953 S.W.2d 478, 481 (Tex.App.-Fort Worth 1997, no writ).

Turner v. Turner, 1999 WL 33659, *2 (Court of Appeals of Texas, Houston, 14th District) (1999)(emphasis added). When Defendant filed his Answer, without an objection to jurisdiction, he consented to personal jurisdiction of the Texas court. The Defendant cannot now come before this court and assert that Texas did not have any jurisdiction over the matter.

As for the Defendant's claim that the Texas action was barred by the statute of limitations, this issue has previously been determined by the January 18, 1996 Order entered by this court stating that, [t]here appears to be, from this Court's review of the pleadings, no meritorious defenses to the action in Texas..." The court declines to review this issue again because: (1) the issue has been determined by a previous ruling of this court; (2) the Defendant has appealed said Order to the West Virginia Supreme Court of Appeals and was refused; and (3) any time period for having the court reconsider its ruling has long since past. The Defendant owes a lawful debt to the Plaintiff. Any and every possible defense of the Defendant for paying said debt has now been litigated before this court. Continued pleas by the Defendant for the purpose of delaying payment of said lawful debts will no longer be entertained by this court.

RULING

For the reasons set forth in the foregoing opinion, this Court **ORDERS;**

That the Defendant's Motion to Dismiss Order Entered January 18, 1998 is hereby DENIED.

The Clerk is directed to mail a copy of this ORDER to counsel of record and pro se parties.

Entered this 26th day of January, 2000.

/s/ JOHN A. HUTCHISON,
CHIEF JUDGE
10th Judicial District